

ENROLLED ORIGINAL

AN ACT

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

*Codification
District of
Columbia
Official Code*

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To establish procedural enhancements to aid in the enforcement of the Tobacco Settlement Model Act of 2000.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA,
That this act may be cited as the "Tobacco Product Manufacturer Reserve Fund
Complementary Procedures Act of 2004".

Sec. 2. Findings and Purpose.

The Council finds that violations of the Tobacco Settlement Model Act of 2000, effective July 18, 2000 (D.C. Law 13-139; D.C. Official Code § 7-1801.01 *et seq.*) ("Model Act") threaten the integrity of the tobacco Master Settlement Agreement, as defined in section 2 of the Model Act, the fiscal soundness of the District, and the public health and that enacting the procedural enhancements set forth in this act will aid in the enforcement of the Model Act and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the District, and the public health.

Sec. 3. Definitions.

For the purposes of this act, the term:

(1) "Brand Family" means all styles of cigarettes sold under the same trademark and differentiated from one another by additional modifiers or descriptors, including "menthol," "lights," "kings," and "100s," and includes any brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

(2) "Cigarette" has the same meaning as in section 2(4) of the Model Act.

(3) "Master Settlement Agreement" has the same meaning as in section 2(5) of the Model Act.

(4) "Non-participating Manufacturer" means any Tobacco Product Manufacturer that is not a Participating Manufacturer.

(5) "Participating Manufacturer" has the meaning given that term in Section

ENROLLED ORIGINAL

II(ji) of the Master Settlement Agreement and all amendments to it.

(6) "Qualified Escrow Fund" has the same meaning as that term is defined in section 2(6) of the Model Act.

(7) "Tobacco Product Manufacturer" has the same meaning as that term is defined in section 2(9) of the Model Act.

(8) "Units Sold" has the same meaning as that term is defined in section 2(10) of the Model Act.

(9) "Wholesaler" means a wholesaler licensed under section 47-2404(b)(1) of the District of Columbia Official Code.

Sec. 4. Certifications; directory; tax stamps.

(a) Every Tobacco Product Manufacturer whose cigarettes are sold in the District whether directly or through a wholesaler, retailer, or similar intermediary shall execute and deliver on a form prescribed by the Mayor, a certification to the Mayor, no later than the April 13th of each year, certifying under penalty of perjury that, as of the date of such certification, the Tobacco Product Manufacturer is a Participating Manufacturer or is in full compliance with section 3(2) of the Model Act, including all quarterly installment payments required by regulations promulgated pursuant to section 6(e); and:

(1) A Participating Manufacturer shall include in its certification a list of its Brand Families, which shall be updated 30 days prior to any addition to or modification of its Brand Families by executing and delivering a supplemental certification to the Mayor.

(2)(A) A Non-Participating Manufacturer shall include in its certification the following information:

(i) A list of all of its Brand Families and the number of Units Sold for each Brand Family that were sold in the District during the preceding calendar year;

(ii) A list of all of its Brand Families that have been sold in the District at any time during the current calendar year;

(iii) Indicating, by an asterisk, any Brand Family sold in the District of Columbia during the preceding calendar year that is no longer being sold in the District of Columbia as of the date of such certification;

(iv) Identifying by name and address, any other manufacturer of such Brand Families in the preceding or current calendar year;

(v) That it is registered to do business in the District or has appointed a resident agent for service of process and provided notice thereof as required by section 5;

(vi) That it has established and continues to maintain a Qualified Escrow Fund, and that it has executed a qualified escrow agreement, which shall govern the Qualified Escrow Fund, that has been reviewed and approved by the Mayor;

(vii) That it is in full compliance with section 3(2) of the Model Act, this act, and any regulations promulgated pursuant to the Model Act and this act;

ENROLLED ORIGINAL

(viii) The name, address, and telephone number of the financial institution where the Non-Participating Manufacturer has established such Qualified Escrow Fund required pursuant to section 3(2) of the Model Act and all regulations promulgated pursuant to the Model Act;

(ix) The account number of the Qualified Escrow Fund and any sub-account number for the District;

(x) The amount the Non-Participating Manufacturer has placed in the fund for cigarettes sold in the District during the preceding calendar year, including the date and amount of each deposit, and such evidence or verification as may be deemed necessary by the Mayor to confirm this information; and

(xi) The amount and date of any withdrawal or transfer of funds the Non-Participating Manufacturer has made at any time from the fund or from any other Qualified Escrow Fund into which it ever made escrow payments pursuant to section 3(2) of the Model Act and all regulations promulgated pursuant to the Model Act.

(B) The Non-Participating Manufacturer shall update the lists required by this paragraph 30 calendar days prior to any addition to or modification of its Brand Families by executing and delivering a supplemental certification to the Mayor.

(3)(A) A Tobacco Product Manufacturer may not include a Brand Family in its certification unless:

(i) In the case of a Participating Manufacturer, the Participating Manufacturer affirms that the Brand Family is to be deemed to be its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year, in the volume and shares determined pursuant to the Master Settlement Agreement; and

(ii) In the case of a Non-Participating Manufacturer, the Non-Participating Manufacturer affirms that the Brand Family is to be deemed to be its cigarettes for purposes of the Model Act.

(B) Nothing in this section shall be construed as limiting or otherwise affecting the District of Columbia's right to maintain that a Brand Family constitutes cigarettes of a different Tobacco Product Manufacturer for purposes of calculating payments under the Master Settlement Agreement or for purposes of section 3(2) of the Model Act.

(4) Tobacco Product Manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for the required certification for a period of 5 years, unless required by law to maintain them for a greater period of time.

(b) Not later than 150 days after the effective date of this act, the Mayor shall develop and make available for public inspection a directory ("Directory") listing all Tobacco Product Manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (a) of this section and of all Brand Families that are listed in the certifications; provided, that:

(1) The Mayor shall not include or retain in the Directory the name or Brand Families of any Non-Participating Manufacturer that has failed to provide the required

ENROLLED ORIGINAL

certification or whose certification the Mayor determines is not in compliance with subsection (a)(2) of this section, unless the Mayor has determined that the violation has been cured to the satisfaction of the Mayor.

(2) Neither a Tobacco Product Manufacturer nor Brand Family shall be included or retained in the Directory if the Mayor concludes, in the case of a Non-Participating Manufacturer, that:

(A) Any escrow payment required pursuant to section 3(2) of the Model Act for any period for any Brand Family, whether or not listed by such Non-Participating Manufacturer, has not been fully paid into a Qualified Escrow Fund governed by a qualified escrow agreement that has been approved by the Mayor; or

(B) Any outstanding final judgment, including interest, for a violation of section 3(2) of the Model Act has not been fully satisfied for the Brand Family or the manufacturer.

(3)(A) The Mayor shall update the Directory as necessary in order to correct mistakes and to add or remove a Tobacco Product Manufacturer or Brand Family to keep the Directory in conformity with the requirements of this act and shall post in the Directory notice of any removal from the Directory of a Tobacco Product Manufacturer or Brand Family at least 30 days prior to removal from the Directory of the Tobacco Product Manufacturer or Brand Family; and unless otherwise provided by agreement between:

(i) A Wholesaler and a Tobacco Product Manufacturer, the Wholesaler shall be entitled to a refund from a Tobacco Product Manufacturer for any money paid by the Wholesaler to the Tobacco Product Manufacturer for any cigarettes of the Tobacco Product Manufacturer in the possession of the Wholesaler on the effective date of removal from the Directory, or as subsequently received from a retail dealer as provided herein, of that Tobacco Product Manufacturer or Brand Family of cigarettes.

(ii) A retail dealer and a Wholesaler, a retail dealer shall be entitled to a refund from a Wholesaler or a Tobacco Product Manufacturer for any money paid by the retail dealer to such Wholesaler or Tobacco Product Manufacturer for any cigarettes of the Tobacco Product Manufacturer still in the possession of the retail dealer on the effective date of removal from the Directory of that Tobacco Product Manufacturer or Brand Family of cigarettes.

(B) The Mayor shall not restore to the Directory the Tobacco Product Manufacturer or the Brand Family until the Tobacco Product Manufacturer has paid the Wholesaler or retail dealer any refund due.

(4) Every Wholesaler shall provide and update as necessary an electronic mail address to the Mayor for the purpose of receiving any notifications as may be required by this act.

(c) It shall be unlawful for any person to:

(1) Affix a stamp to a package or other container of cigarettes of a Tobacco Product Manufacturer or Brand Family not included in the Directory, or

ENROLLED ORIGINAL

(2) Sell, offer, or possess for sale, in the District, or import for personal consumption in the District, cigarettes of a Tobacco Product Manufacturer or Brand Family not included in the Directory.

Sec. 5. Agent for service of process.

(a)(1) Any non-resident or foreign Non-Participating Manufacturer that has not registered to do business in the District as a foreign corporation or business entity shall, prior to having its Brand Families included or retained in the Directory, appoint and continually engage without interruption the services of an agent in the District to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of this act or the Model Act, may be served in any manner authorized by law and which shall constitute legal and valid service of process on the Non-Participating Manufacturer.

(2) The Non-Participating Manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of the agent to, and to the satisfaction of, the Mayor.

(b)(1) The Non-Participating Manufacturer shall provide notice to the Mayor 30 calendar days prior to termination of the authority of an agent and shall further provide proof, to the satisfaction of the Mayor, of the appointment of a new agent no less than 5 calendar days prior to the termination of an existing agent appointment.

(2) If an agent terminates an agency appointment, the Non-Participating Manufacturer shall notify the Mayor of the termination within 5 calendar days and shall include proof, to the satisfaction of the Mayor, of the appointment of a new agent.

Sec. 6. Reporting of information; escrow installments.

(a) Not later than 20 calendar days after the end of each calendar quarter, and more frequently if so directed by the Mayor, each Wholesaler shall submit such information as the Mayor requires to facilitate compliance with this act, including a list, by Brand Family, of the total number of cigarettes, or, in the case of roll your own, the equivalent stick count, for which the Wholesaler affixed stamps during the previous calendar quarter or otherwise paid the tax due for such cigarettes. The Wholesaler shall maintain, and make available to the Mayor, all invoices and documentation of sales of all Non-Participating Manufacturer cigarettes and any other information relied upon in reporting to the Mayor for a period of 5 years.

(b) The Corporation Counsel is authorized to disclose any information to the Mayor received under this act and requested by the Mayor for purposes of determining compliance with and enforcing the provisions of this act. The Corporation Counsel and the Mayor shall share with each other the information received under this act, and may share such information with other federal, state, District, or local agencies only for purposes of enforcement of this act, the Model Act, or corresponding laws of other jurisdictions.

(c) The Mayor may require, at any time, from the Non-Participating Manufacturer,

ENROLLED ORIGINAL

proof from the financial institution in which the Manufacturer has established a Qualified Escrow Fund, for the purpose of compliance with section 3(2) of the Model Act, of the amount of money in the fund, exclusive of interest, the amount and date of each deposit to the fund, and the amount and date of each withdrawal from the fund.

(d) In addition to the information required to be submitted pursuant to this act, the Mayor may require a Wholesaler or Tobacco Product Manufacturer to submit any additional information, including samples of the packaging or labeling of each Brand Family, as is necessary to enable the Mayor to determine whether a Tobacco Product Manufacturer is in compliance with this act.

(e) To promote compliance with this act, the Mayor may promulgate regulations requiring a Tobacco Product Manufacturer, subject to the requirements of section 4(a)(2), to make the escrow deposits required in quarterly installments during the year in which the sales covered by such deposits are made. The Mayor may require production of information sufficient to enable the Mayor to determine the adequacy of the amount of the installment deposit.

Sec. 7. Penalties and other remedies.

(a)(1) In addition to, or in lieu of, any other civil or criminal remedy provided by law, upon a determination that any person has violated section 4(c) or any regulation adopted pursuant to this act, the Mayor may revoke or suspend the license of the Wholesaler in the manner provided by section 47-2404(f) of the District of Columbia Official Code.

(2) Each stamp affixed and each sale or offer to sell cigarettes in violation of section 4(c) shall constitute a separate violation. Pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code § 2-1801.01 *et seq.*), the Mayor may also impose a civil fine in an amount not to exceed the greater of 500% of the retail value of the cigarettes or \$5,000 for any violation of section 4(c) or any regulations adopted pursuant to this act.

(b) Any cigarettes that have been sold, offered for sale, or possessed for sale, in the District, or imported for personal consumption in the District, in violation of section 4(c) shall be deemed contraband under section 47-2405(b) of the District of Columbia Official Code and the cigarettes shall be subject to seizure and forfeiture as provided in section 47-2409 of the District of Columbia Official Code; provided, that all such cigarettes so seized and forfeited shall be destroyed and not resold.

(c) The Corporation Counsel, on behalf of the District, may seek an injunction to restrain a threatened or actual violation of section 4(c), section 6(a), or section 6(d) by a Wholesaler and compel the Wholesaler to comply with the subsections.

(d)(1) It shall be unlawful for a person to:

(A) Sell or distribute cigarettes, or

(B) Acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale

in the District in violation of section 4(c).

(2) A violation of this subsection shall, upon conviction, be punishable by a fine of not more than \$5,000 or imprisonment of not more than 1 year, or both. Prosecutions for violations of this subsection shall be brought in Superior Court of the District of Columbia in the name of the District by the Corporation Counsel.

Sec. 8. Miscellaneous Provisions.

(a) A determination of the Mayor to not include or to remove from the Directory a Brand Family or Tobacco Product Manufacturer shall be subject to review in the manner prescribed by the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*).

(b) No person shall be issued a license or granted a renewal of a license to act as a Wholesaler unless that person has certified in writing, under penalty of perjury, that he or she will comply fully with this act.

(c) The first report of Wholesalers required by section 6(a) shall be due 45 calendar days after the date on which this act becomes effective; the certifications by a Tobacco Product Manufacturer described in section 4(a) shall be due 45 calendar days after the effective date of this act; and the Directory described in section 4(b) shall be published or made available within 150 calendar days after the effective date of this act.

(d) The Mayor may promulgate regulations necessary to effect the purposes of this act.

(e) In any action brought by the District to enforce this act, the District shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees.

(f) If a court determines that a person has violated this act, the court shall order any profits, gain, gross receipts, or other benefit derived from the violation to be disgorged and paid to the District. Unless otherwise expressly provided, the remedies or penalties provided by this act are cumulative to each other and to the remedies or penalties available under all other laws of the District.

(g)(1) If a court of competent jurisdiction finds that the provisions of this act and of the Model Act conflict and cannot be harmonized, then the provisions of the Model Act shall control.

(2)(A) If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this act causes the Model Act to no longer constitute a Qualifying or Model Statute, as those terms are defined in the Master Settlement Agreement, then that portion of this act shall not be valid.

(B) If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this act is for any reason held to be invalid, unlawful, or unconstitutional, that holding shall not affect the validity of the remaining portions of this act or any part of this act.

ENROLLED ORIGINAL

Sec. 9. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 10. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia